Supreme Court, U.S.
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No. 96-1494

IN THE

Supreme Court Of The United States

October Term, 1996

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, BEAZER MATERIALS AND SERVICES, INC., CARRIER CORPORATION, EXXON CORPORATION, FORD MOTOR COMPANY, ROME STRIP STEEL COMPANY, INC., THE STANLEY WORKS, AND UNITED TECHNOLOGIES CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF BEAZER MATERIALS AND SERVICES, INC. (N/K/A BEAZER EAST, INC.), EXXON CORPORATION AND FORD MOTOR COMPANY

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QUESTION PRESENTED

I. Whether this Court should grant certiorari, vacate the judgment below, and remand the case to the Third Circuit to determine, in light of this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which intervened between *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992)(*"Alcan I"*) and *United States v. Alcan Aluminum Corp.*, 96 F.3d 1434 (3rd Cir. 1996) (*"Alcan II"*), whether Section 107(a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9607(a)(3) should be construed to create retroactive liability for a party that "arranged for disposal" prior to the date of CERCLA's adoption.

PARTIES AND RULE 29.6 STATEMENT

The parties whose counsel appeared in the most recent Third Circuit proceeding were the United States of America, Alcan Aluminum Corporation, Beazer Materials and Services, Inc. (n/k/a Beazer East, Inc.), Carrier Corporation, Exxon Corporation, Ford Motor Company, Rome Strip Steel Company, Inc., The Stanley Works, and United Technologies Corporation.

List of Parent Companies and Nonwholly Owned Subsidiaries

The parent company of Beazer Materials and Services, Inc. (n/k/a Beazer East, Inc.) is Hanson PLC. Beazer Materials and Services, Inc. has no nonwholly owned subsidiaries.

Exxon Corporation has no parent company. Its nonwholly owned subsidiaries are: Compania Minera Disputada de Las Condes S.A.; Esso Malaysia Berhad; Esso Societe Anonyme Francaise; General Sekiyu K.K.; Les Docks des Petroles d'Ambes; Imperial Oil Limited; Societe Francaise, Exxon Chemical; Tonen Kabushiki Kaisha.

Ford Motor Company has no parent company. Its nonwholly owned subsidiaries are: U.S.--Associates First Capital Corporation and Great Mall of the Bay Area Management Company; Argentina -- Invercred Compania Financiera S.A.; Australia -- Ford Motor Company of Australia Limited; Belgium -- Ford Credit N.V. and Ford Motor Company (Belgium) N.V.; Brazil -- Autolatina Comercio e Participacoes Financerias Ltd.; Denmark -- Ford Motor Company A/S; Finland -- Oy Ford Ab; Germany -- Ford Werke-Aktiengesellschaft; Holland -- Ford Nederland B.V.; Japan -- Mazda Motor Corporation; Korea -- Ford Motor Company of Korea; Netherlands -- Ford Credit B.V.; Norway -- Ford Motor Norge A.S.; New Zealand -- Ford Motor Company of New Zealand Limited; Singapore -- Ford Motor Company Private Limited; Switzerland -- Ford Motor Company (Switzerland) S.A.; Vietnam -- Ford Vietnam Limited. Only companies of which Ford has at least a 10% equity interest are listed; joint ventures are not included.

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CERCLA, Sections 101(32), 103(c), 107(a), 107(f), 113(b), 42 U.S.C. 9601(32), 9603(c), 9607(a), 9607(f), 9613(b); The Clean Water Act ("CWA"), Section 311(f), 33 U.S.C. 1321(f).

STATEMENT OF THE CASE

This Response is in partial support of the Petition for Writ of Certiorari by Petitioner Alcan Aluminum Corporation ("Alcan"). It is submitted on behalf of Respondents Beazer Materials and Services, Inc. (now known as Beazer East, Inc.), Exxon Corporation, and Ford Motor Company (hereafter the "Respondents") pursuant to Rule 12.6 of the Rules of the Supreme Court of the United States.

The Statement of the Case presented by Alcan does not include facts relevant to Question V. raised by Alcan and to the Question Presented by this Response (which is subsumed within Alcan's Question V.). Since we believe a fuller statement of the facts will aid in the disposition of this matter, we provide that statement here. Incorrect statements of fact in the Petition for the Writ of Certiorari which relate only to Questions I. through IV. of Alcan's Petition, which questions we do not otherwise address, are listed in a Summary of Incorrect Statements included in the Appendix to this Response.

From mid-1978 through late 1979, Alcan arranged for the disposal of an oily emulsion consisting of waste oil and water. *Alcan I*, 964 F.2d at 256, Pet. A-9.[1] Alcan's oily emulsion also included an emulsifier, Farbest B207 and B216A. J.A. 231-32. The oily emulsion was turned over to an oil recycler that collected oily liquid wastes from numerous companies located in the northeastern United States. *Alcan I*, 964 F.2d at 256, Pet. A-8-9.

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[1] We refer to the Appendix to the Petition for Writ of Certiorari as "Pet. A", and to the Joint Appendix in *Alcan II* as "J.A.".

The recycler disposed of Alcan's oily emulsion by depositing it into a borehole, in Pittston, Pennsylvania (the Pittston borehole) during the period mid-1978 through late 1979. J.A. 251-52. Oily wastes generated by other companies were also, without their knowledge, deposited by the recycler into the same Pittston borehole and commingled with Alcan's oily waste. *See Id.*; *Alcan I*, 964 F.2d at 256, Pet. A-8-9. The government has not alleged and there is no evidence that Alcan or any of the other companies that did business with the recycler knew of his unlawful activities. As noted below, the Department of Justice has characterized the depositing of oily wastes in 1979 into the Pittston borehole as the discharge of a hazardous substance into the environment. J.A. 309, 318.

In late July, 1979, an oily slick appeared on the Susquehanna River. It was later determined by the United States Environmental Protection Agency (EPA) that the materials had reached the River after migrating several miles, via a labyrinth of abandoned mine tunnels and shafts, from the Pittston borehole to a tunnel referred to as the Butler Tunnel. The tunnel drains many of the local mine tunnels and shafts in the area and empties into the Susquehanna River. *See* J.A. 152-55, 207; *Alcan I*, 964 F.2d at 255-56, Pet. A-6-10.

In December, 1980, Congress passed and the President signed the CERCLA statute. The statute has been construed to create strict liability (i.e, liability without fault) for several classes of persons. The class of persons that are included under Section 107(a)(3) are persons that "arranged for disposal" of a hazardous substance. Liability is imposed under CERCLA § 107(a) for costs incurred by the United States (among others) in responding to a release of hazardous substances into the environment. The response costs must be not inconsistent with the National Continency Plan. The statute contains no express provision that any of the potential liability created under it is to be applied retroactively to persons that lawfully "arranged for disposal" prior to the date of CERCLA's adoption. CERCLA does, however, provide that the

term "liable" or "liability" "shall be the construed to be the standard of liability which obtains" under Section 311 of the Clean Water Act, 33 U.S.C.§1321. CERCLA § 101 (32), 42 U.S.C. 9601(32).

In 1985, Hurricane Gloria accompanied by torrential rains struck the Pittston area. A second slick was reported on the Susquehanna. EPA attempted to deploy booms to contain the slick and subsequently cleaned up the banks of the river. J.A. 254.

In 1987, EPA entered into a Consent Order with the Respondents and with others to conduct a study of the Pittston borehole and the Butler Tunnel. J.A. 210. Alcan did not participate in that Consent Order or the study that followed.

In 1989, EPA brought the instant action to collect its response costs incurred in addressing the 1985 oil slick. J.A. 24, 208. EPA's response costs totaled approximately $1.3 million. Pet. A-54. In 1990, the Respondents and others settled with the Government by entering into Consent Decrees and paying $828,500. Alcan did not participate in the settlement.[2] The government continued to seek from Alcan the balance of its cleanup costs of $210,157.46, plus $176,510.09 in interest, and $87,122.63 in enforcement costs (for a total of $473,790.18). *United States v. Alcan Aluminum Corp.*, Civil No. 89-1657 (M.D. Pa., May 8, 1991) (Memorandum and Order of Judge Kosik). Alcan opposed the entry of the Consent Decrees between EPA and Respondents and others. After Alcan's objections were overruled, Alcan sought certification under F.R.C.P. 54(b) so as to appeal the entry of Respon-

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[2] Between 1987 and the present, Respondents and others have also spent more than $3 million conducting a study of the Butler Tunnel site under EPA's direction. As a result of that study EPA has selected a remedy for the Butler Tunnel site estimated by EPA to cost an additional $3.6 million. Thus, total costs at the Site are expected to be in the range of $6.6 million in addition to the $1.3 million involved in the cleanup. Alcan has paid nothing to date.

dents' decree. Certification was denied and Respondents continued as parties to these proceedings.

After a trial in the Middle District of Pennsylvania Alcan was held jointly and severally liable to the government under CERCLA § 107(a) for the balance of the past costs not recovered by the government from Respondents and others, plus interest totaling $473,790.18. *Alcan I*, 964 F.2d at 257, Pet. A-11. On appeal, Respondents participated since, as both a practical and legal matter, their rights would be affected by the outcome of Alcan's appeal. As noted above, there had been no Rule 54(b) certification of their settlement and their costs were continuing without contribution from Alcan.

In *Alcan I* the Third Circuit rejected the argument that there was any threshold concentration for a substance to be "hazardous" under CERCLA. *Id.* at 259-61, Pet. A-14-19. The Third Circuit also rejected Alcan's argument that its oily emulsion was not a hazardous substance or that it was exempt under the so-called petroleum exclusion from the definition of a hazardous substance under CERCLA. *Id.*

The Third Circuit noted, however, that CERCLA does not expressly provide for joint and several liability. Congress intended that whether there is any joint and several liability under CERCLA should be determined in accordance with the common law principles reflected in the Restatement of Torts, Sections 433A and 881. *Id.* at 268-69, Pet. A-32-36. Accordingly, the Third Circuit in *Alcan I* reversed and remanded the case for a determination as to whether joint and several liability should be imposed upon Alcan. *Id.* at 271, Pet. A-38. Consistent with Restatement principles, the Third Circuit in *Alcan I* noted that if Alcan could show a reasonable basis for apportionment of the harm, it would be liable only for the share of the harm it caused, and if it could show that it had not

contributed to the harm at all, it would be liable for nothing. *Id.*[3]

On remand the District Court held that Alcan had not shown that its oily emulsion, taken as a whole when commingled with other oily wastes, had not contributed at all to the harm (the oil slick), and that Alcan had not shown any reasonable basis of apportionment of the harm under Restatement principles "such as the percentage of the volume of total waste represented by Alcan's waste", Pet. A-52-53, "toxicity or migratory potential", or other factors Pet. A-65-66.

Alcan also urged that the discharge in 1985 was due to an "act of God" (Hurricane Gloria) and therefore subject to a defense from liability under CERCLA § 107(b). Pet. A-66-68. The government on oral argument urged that the Act of God defense did not apply since the discharge into the environment, which is a prerequisite for CERCLA liability, was complete when the dumping into the borehole occurred in 1979. J.A. 309, 318. The District Court rejected the "act of God" defense, albeit on other grounds. Pet. A-66-68.

Alcan applied to the District Court for reconsideration. The motion was denied on October 4, 1995 - the Court essentially adhering to its original position. Alcan appealed a second time to the United States Court of Appeals for the Third Circuit, in what we now refer to as *Alcan II*. While *Alcan II* was pending in the Third Circuit, the United States District Court for the Southern District of Alabama, in *United States*

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[3] At the conclusion of its opinion in *Alcan I* the Third Circuit referred to Alcan having to prove on remand that the hazardous substances in its emulsion caused no harm if it wanted to avoid all liability. 964 F. at 271, Pet. A-38. Earlier in the same section of its opinion, the Third Circuit referred to Alcan having to prove that its emulsion caused no harm if it wanted to avoid all liability. 964 F.2d at 270, Pet. A-37. The Restatement contains no definition of hazardous substances and no petroleum exclusion. It simply focuses on the cause of the harm. We assume this question will be addressed by the government which is also a Respondent on this Petition.

v. Olin Corp, 927 F. Supp. 1502 (S.D. Ala. 1996), ruled that since CERCLA contained no express provision for retroactive liability and there was no clear legislative intent to create retroactive liability, the presumption of prospective liability under *Landgraf* applied. The District Court in *Olin* dismissed the government's action for lack of subject matter jurisdiction.[4]

In the instant case, no claim against Alcan has been asserted by the government except under CERCLA § 107(a)(3), based on Alcan's having "arranged for disposal" prior to CERCLA's adoption. Additionally, as noted above, the government's position is that the discharge into the environment (the deposit of the oily wastes into the borehole) also took place in 1979, prior to CERCLA's adoption. Within two weeks after the *Olin* District Court's decision (which was the first widely reported District Court decision to apply *Landgraf* to CERCLA), Alcan moved in the Third Circuit to dismiss the government's case for lack of subject matter jurisdiction on *Landgraf* grounds. Thereafter, the Third Circuit allowed Respondents and the government to file supplemental briefs on the issue of retroactivity.

On August 22, 1996, the Third Circuit affirmed the District Court's decision without opinion. Pet. A-102-04. As Alcan contends in this Court, there was no ruling on the motion to dismiss for lack of subject matter jurisdiction (i.e., that on the undisputed facts, CERCLA is not applicable to arranging for disposal prior to CERCLA's adoption in 1980). The government did not deny that Alcan arranged for disposal before CERCLA's adoption or that the government sought the

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[4] The District Court in *Olin* also ruled that on the facts before it CERCLA exceeded Congress' authority under the commerce clause. That issue is not involved in the instant proceeding. Subsequent to the docketing of the Petition for Writ of Certiorari in the instant case, the United States Court of Appeals for the Eleventh Circuit reversed the District Court's decision. *United States v. Olin*, 1997 U.S.App. LEXIS 5488 (March 25, 1997).

imposition of retroactive liability. Thus, a basic question before the Third Circuit was whether it could affirm a judgment against Alcan based solely on CERCLA, without deciding on the undisputed facts if CERCLA applied to the conduct involved. The Third Circuit did not answer the question but merely affirmed without opinion the District Court's judgment that Alcan was jointly and severally liable under CERCLA.[5] The District Court, in turn, had not passed on the retroactivity issue since its focus on remand had been on whether Alcan had showed a reasonable basis for apportionment of the harm under the Restatement.

SUMMARY OF ARGUMENT

This Court's eight to one decision in *Landgraf*, which intervened between *Alcan I* and *Alcan II*, left uncertain whether the initial determination of Alcan's liability under CERCLA was (or was not) correct. In *Landgraf*, this Court refused to apply retroactively additional liability created as to a person that willfully "engaged in" discriminatory conduct since the conduct had occurred before the additional liability was created. This Court first clarified the definition of when liability is truly retroactive. Additionally, noting the unfairness of increasing liablity after a person has acted, this Court ruled that liability is presumed to be created prospectively. Retroactive liability will only be applied if the people's elected representatives have taken into account the unfairness of retroactive liability and clearly decided that the benefits outweigh the unfairness. The Court also ruled that even if the application of retroactive liability would further the purpose of a statute, that is not sufficient to overcome the presumption of prospective application. A section by section analysis of a statute is needed to determine whether Congress actually de-

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[5] As noted below, the government argued that the issue did not go to subject matter jurisdiction and, in any event, was raised late by Alcan. That issue was also briefed but not decided.

cided to create retroactive liability in the specific provision at issue. Since the instant case was pending on appeal after *Landgraf* was decided, the Third Circuit was obligated to apply *Landgraf* to the case. *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974); *see Landgraf* at 273-277.[6]

Thus, the question of whether CERCLA created retroactive liability for a party that lawfully "arranged for disposal" of wastes before CERCLA was adopted should have been answered by the Third Circuit in *Alcan II*. It was not. Accordingly, we believe this Court should grant certiorari, vacate the judgment below, and remand the case to the Third Circuit to determine, in light of this Court's decision in *Landgraf*, whether CERCLA Section 107(a)(3) should be construed to create retroactive liability for a person that lawfully "arranged for disposal" prior to the date of CERCLA's adoption. As of this date, only one Circuit has passed on the retroactivity of CERCLA after *Landgraf*, albeit in the context of a current property owner or owner at the time of disposal under Sections 107(a)(1) and 107(a)(2) of CERCLA. As noted below, liability under these subsections appears to present different retroactivity questions than claims under Section 107(a)(3) of CERCLA.

In our argument below, we will first review this Court's decision in *Landgraf*. Second, we will review the statutory language. The statute contains no statement that it is retroactive, and the statutory language related to the specific liability question is consistent with only prospective application as to persons that lawfully "arranged for disposal" prior to the adoption of the statute. Third, we will review the legislative history of CERCLA. In the House, an express retroactivity provision was stricken in committee. In the end, the House abandoned its own bill in favor of a last minute "compromise" bill crafted in the Senate that was silent on all of the "hot button" liability issues

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[6] Since *Landgraf* itself creates no new legal obligation for past conduct, the application of *Landgraf* to pending cases raises no retroactivity issue. *See Landgraf* 511 U.S. at 280.

that had prevented passage, including retroactive liability, joint and several liability, and strict liability. We will show that the legislative compromise that was struck was to avoid expressly dealing with any of those issues. Instead, the Senate compromised on incorporation by reference of the standard of liability of the Clean Water Act that had been in place since 1972. Each Senator put his own "spin" on what had been agreed to. No one said the compromise created retroactive liability. As noted below, the Clean Water Act is a quintessentially prospective statute. The House was presented with the Senate CERCLA bill on a "take it" or "leave it" basis, with no changes permitted. The House accepted the Senate version as presented. There was no Senate-House Conference Report. The only Senate Report is to an earlier version of the Senate Bill which its own sponsors admitted "cannot be enacted". Against this background, the presumption against retroactivity in *Landgraf* is dispositive.

The government can be expected to try to avoid sending the case back to the Third Circuit for a ruling on retroactivity by claiming the issue should have been presented prior to or during *Alcan I*. The problem is that *Landgraf* was not decided until almost two years after *Alcan I*. The government asserts that *Landgraf* changed nothing. As we shall show, that is simply not correct. The government also asserts that the issue is not jurisdictional. The government does not deny, however, that it has relied upon CERCLA for subject matter jurisdiction. A subject matter jurisdiction defense can be raised at any time. Moreover, even if retroactivity is considered to go to whether a cause of action is stated instead of to subject matter jurisdiction, any delay in raising the defense prior to *Alcan II* does not mandate its rejection - that is discretionary under Rule 12(h)(2) of the Federal Rules of Civil Procedure. The Third Circuit should at least be required to exercise its discretion.[7]

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[7] Rule 12(h)(1) mandates waiver for certain claims (lack of jurisdiction of the person, improper venue, etc.). Rule 12(h)(3) prohibits waiver for subject matter jurisdiction issues. Rule 12(h)(2) is an "intermediate"

ARGUMENT

The *Landgraf* Decision

In *Landgraf* the District Court found that the plaintiff had been sexually harassed in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and that the harassment was serious enough to establish that a hostile work environment existed for plaintiff, Landgraf. The employer transferred the employee doing the harassing. Plaintiff resigned shortly thereafter for reasons unrelated to the harassment she had experienced. 511 U.S. at 248. The only remedy provided by the 1964 Act for violation of Title VII at the time was equitable *(i.e.*, restoration in the form of back pay). Since plaintiff had resigned for reasons unrelated to the harassment, she was not eligible for that remedy. The District Court dismissed the action. While the case was pending on appeal, Congress effectively amended Title VII when it adopted the Civil Rights Act of 1991 (the "1991 Act"). The 1991 Act provided for compensatory damages and punitive damages against anyone "who engaged in" unlawful intentional discrimination in violation of Title VII of the Act. A right to trial by jury was provided for anyone seeking compensatory and punitive damages. The Court of Appeals declined to apply any of those provisions in the 1991 Act to the case. *Id.* at 249. This Court noted that " the controlling question is whether the Court of Appeals should have applied the law in effect at the time the

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category in which waiver is permissible but not mandatary. *Weaver v. Bowers*, 657 F.2d 1356, 1359-62 (3rd Cir. 1981), *cert denied,* 455 U.S. 942 (1982)(retroactivity issue considered notwithstanding failure to raise it below - "courts of appeals have inherent power to reach [Rule 12(h)(2)] issues although not timely raised below"). In the instant case, Respondent the United States, is seeking to have CERCLA apply retroactively to conduct that occurred before CERCLA was adopted, while using a claim of waiver to avoid having *Landgraf* apply to a CERCLA case still pending on appeal. As noted above, the Third Circuit did not rule on the motion to dismiss.

discriminatory conduct occurred, or at the time of its decision in July 1992." *Id.* at 250. This Court ruled that none of the referenced provisions of the 1991 Act applied and that the law that governed was the law in effect at the time of the conduct complained of. *Id.* at 286.

Landgraf did basically two things. First, it clarified and narrowed the definition of what constituted retroactive application of a new statute. A statute is not considered to have retroactive effect unless applying the change to past conduct "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Second, as to those limited situations in which a statute will have retroactive effect as so defined, *Landgraf* "raised the bar". Emphasizing the fundamental unfairness of changing the rules after conduct was completed, this Court ruled that a statute would not be given retroactive effect unless it was clear that the people's elected representatives in Congress had considered the issue of retroactivity and decided that the benefits to be gained by retroactivity outweighed the unfairness. *Id.* at 270-73. This clear legislative decision may be manifest either on the face of the statute or in clear legislative history.[8]

Landgraf also teaches that it is not sufficient to look at general legislative purpose, since that does not tell where the compromise on achieving generalized objectives was struck. Nothing would have better furthered the overall legislative purpose of providing a remedy for those that were the victims of sexual discrimination than to apply the expansion of the

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[8] The concurring opinion in Landgraf would limit the inquiry to the face of the statute since that is the only thing on which the elected representatives actually vote and which the President signs. The tendency of various Congressmen and Senators to attempt to "pack" the legislative history with their own views, or those of various advocacy groups, is increasingly well known. 511 U.S. at 287 (Scalia, J., concurring).

remedies of Title VII retroactively. This Court rejected that approach and insisted on an examination of the specific provisions involved and a determination as to whether Congress clearly intended that those provisions create retroactive liability. *See Id.* at 280-85.

As will be shown below, many of the pre-*Landgraf* decisions (and some of the post-*Landgraf* decisions) that sustained retroactive CERCLA liability did so incorrectly on the basis that either retroactivity was not involved, or on the basis that judicially imposed retroactive liability was justified by Congress' broad remedial purpose to address abandoned dump sites. After *Landgraf* neither approach is tenable.

The government argued below that *Landgraf* really changed nothing. The above points indicate otherwise. This Court itself noted that prior to *Landgraf*,

> [o]ur precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance, and suggested that some provision might apply to cases arising before enactment while other might not. [citations omitted].

Id. at 261. After *Landgraf* there is no such doubt.

A Textual Analysis of CERCLA Indicates Congressional Intent to Apply Liability for Those That Lawfully Arranged for Disposal Prospectively Not Retroactively

Congress defined "liable" or "liability" in CERCLA as "the standard of liability which obtains under section 1321 of Title 33 [section 311 of the Clean Water Act]." CERCLA § 101(32), 42 U.S.C. § 9601(32). Section 311 sets up a system of penalties for unlawful discharges into waters of the United States, as well as cleanup obligations therefor. It is a quintessentially prospective statute. Typically, discharge and discovery are contemporaneous. Since its enactment in 1972, through December 11, 1980 when CERCLA was adopted, we have found no record of the Clean Water Act ("CWA") having ever been applied to a discharge occurring before 1972,

nor any case discussing the possibility of applying CWA "retroactively" to pre-1972 conduct. The whole approach of the CWA is to hold liable owners and operators at the time of discovery of a spill. CWA § 311(f), 33 U.S.C. § 1321(f). Because CERCLA specifically incorporates the standard of liability under CWA, CERCLA on its face is prospective only. Indeed, as will be shown below, the last minute engrafting of the CWA standard of liability was a key element in the final legislative compromise that allowed CERCLA to pass.

CERCLA also contains an effectivity clause: "Unless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980." CERCLA § 301(a), 42 U.S.C. § 9651(a). An almost identical provision is contained in the 1991 Act referred to in *Landgraf*. As to that provision the Court stated: "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." 511 U.S. at 257. The Court later noted that such a provision simply denotes an absence of an intention by Congress with respect to retroactivity - it denotes a willingness to allow the matter to be decided under normal judicial standards, including the presumption against retroactivity. *Id.* at 280.

The structure of the liability provisions of CERCLA is also consistent with prospective liability for persons that lawfully "arranged for disposal" prior to CERCLA's adoption. CERCLA provides for the cleaning up of abandoned waste sites in two ways. First, it created a $1.6 billion dollar fund (subsequently increased to $8.5 billion.) The fund was to be in part created and replenished from a "feed stock" tax on petrochemical shipments. Second, CERCLA created a liability mechanism under Section 107 to deter the mishandling of hazardous wastes and further help replenish the fund. The liability structure also authorized EPA to directly impose the costs of cleanup on parties that are potentially liable under CERCLA § 107 by issuing orders under CERCLA § 106 to do the cleanup.

Those cleanup orders are backed by sanctions of up to $25,000 per day and treble damages for noncompliance.

Thus, there is no question but that the generalized purpose of CERCLA was to address the problem of abandoned waste sites (such as the Love Canal site) and to help to replenish the fund created by a combination of the feedstock tax and the liability structure. However, it is not the purpose of the act as a whole that must be considered. To the contrary, courts should evaluate each provision of the Act to determine whether a clear Congressional decision had been made to impose retroactive liability under the provision in question. *See* 511 U.S. at 280-86.

The Provisions of Section 107

CERCLA § 107(a) creates liability for four classes of persons. Section 107(a)(1) creates liability for the current owners of facilities. Section 107(a)(2) creates liability for those who owned or operated the facility "at the time of disposal". Section 107(a)(3) creates liability for those who "arranged for disposal". Section 107(a)(4) creates liability for any person who "accepts or accepted" the materials for transport.

The government frequently argues that the use of the past tense ("owned or operated", "arranged for disposal", or "transported") manifests a clear Congressional intent to have the liability created apply retroactively. It should be obvious that the use of the past tense is not dispositive. For example, "operated" can mean "operated" before or after the date of adoption. Indeed, the very statutory language at issue in *Landgraf* that this Court found to be prospective only used the past tense (anyone who "engaged in" unlawful discrimination). A closer look at the specific language of each subsection is required.

Section 107(a)(1), which establishes that the current owner is potentially liable, simply does not present a retroactivity question at all under *Landgraf*. Application of liability to a current owner (i.e., owner at the time the action is commenced) of necessity is to a person that either continued ownership or acquired ownership after CERCLA was adopted. Thus, Section 107(a)(1)

liability does not get past the first prong of *Landgraf* - it creates no retroactivity issue.

Section 107(a)(2) creates liability for anyone who owned or operated the facility "at the time of disposal". Given the concerns about Love Canal and other abandoned sites, the use of the temporal phrase, "at the time of disposal", is suggestive that liability is not necessarily limited to property "owned or operated" after enactment. This reading of Section 107(a)(2) finds some support in Section 103(c) of CERCLA, but that provision also supports our position as to Section 107(a)(3).

CERCLA Section 103(c) provides that within 180 days of the passage of CERCLA, "any person who owns or operates or who at the time of disposal owned or operated a facility" at which hazardous wastes are or have been stored must make notification to the government. This was apparently an attempt by Congress to obtain information from property owners that had contaminated their own property. Failure to provide the information forfeits any defenses to liability under the Statute. The government urged below that if there was no potential for retroactive liability in the first place, there would be no need for a forfeiture of defenses. This misses the point that the liability of current owners (under CERCLA § 107(a)(1)) does not raise a retroactivity issue. We have already noted that on balance the temporal reference in Section 107(a)(2) for owners "at the time of disposal" tends to support the government as to that clause. However, it is significant to note that no information is sought at all under Section 103(c) from anyone who had "arranged for disposal". Following the government's logic leads to the inference that no forfeiture of defenses was provided as to persons who lawfully arranged for disposal before CERCLA's adoption because they had no potential retroactive liability in the first place. Given the legal craftsmanship that went into CERCLA, the clause may simply indicate an intent to gather information from culpable parties[9] which could

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[9] Besides current owners and owner or operators at time of disposal, similar information was to be provided by transporters but only if the

be used to locate sites and to punish those who didn't provide the information. To the extent the clause is relevant, however, it supports our position that there was no intention to impose retroactive liability on anyone that lawfully arranged for disposal before CERCLA was adopted, since that class of persons is not covered at all.

Finally, with respect to Section 107(a)(3) itself, the government's past tense argument breaks down completely. As noted above, "arranged for" can of course mean "arranged for" before or "arranged for" after the date of adoption. Section 107(a)(3) contains no temporal statement. Moreover, as several courts have noted, the tense argument if applied to Sections 107(a)(3) and 107(a)(4) would produce retroactive but not prospective liability for those that arranged for disposal. This a senseless result.[10]

The government's other standard statutory argument is that since CERCLA § 107(f) limits the collection of natural resource damages to those occurring after the date of CERCLA's adop-

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transporter also selected the facility at which hazardous substances were stored or disposed of.

[10] If past tense was intended to mean conduct prior to enactment, then logically the use of the present tense would mean conduct after enactment. CERCLA § 107(a)(4) would cover both conduct before enactment ("any person who ... *acceptea* any hazardous substances...") and conduct after enactment ("any person who *accepts* any hazardous substances..."). By contrast Section 107(a)(3), the section at issue here, is written only in the past tense ("any person who ... *arranged* for disposal..."). As explained in *State of Ohio ex rel. Brown v. Georgeoff*, 562 F.Supp 1300, 1310 (N.D. Ohio 1983):

> Under [the plaintiff's] view, therefore, this provision would apply to generators who arranged for disposal before the enactment of CERCLA, and not those who arrange for disposal after the enactment of CERCLA. Such a construction produces the anomalous result of providing for retroactive, but not a prospective, application of the statute, a result which Congress could not have intended.

See also, State of Nevada ex rel. Dep't of Transp. United States, 925 F.Supp. 691, 699 (D.Nev. 1996)(rejecting government's "past tense" argument).

tion, there is a "negative inference" to be drawn that Congress intended that liability for response costs should be retroactive. *Landgraf* explicitly rejected a similar type of negative inference argument. "Given the high stakes of the retroactivity question, ... it would be surprising for Congress to have chosen to resolve that question through negative inferences..." 511 U.S. at 259. Moreover, in the CERCLA context, Section 107(f) simply limits what a person who is liable under Section 107(a) is liable for. It does not expand the definition of who may be found liable in the first instance.

For example under Section 107(a)(1) the government can recover from the current owner of a site the response costs incurred in cleaning up the site, assuming the other statutory requisites are met (e.g., a discharge of a hazardous substance to the environment and the incurrence of response costs by the government not inconsistent with the National Contingency Plan.) There is no limitation on recovery from the current owner of response costs whether the damage occurred prior to the adoption of CERCLA or after it. Recovery of natural resources damages from the current owner under CERCLA § 107(a)(1), however, is limited by Section 107(f). This scenario is not inconsistent with holding that the liability created under CERCLA § 107(a)(3) is prospective only. To put it another way, finding that CERCLA § 107(a)(3) liability is prospective does not render the damages limitation in §107(f) superfluous since the limitation would still apply to CERCLA § 107(a)(1) and perhaps to CERCLA § 107(a)(2) liability. There simply is no negative inference to be drawn and no inconsistency.

The Legislative History of CERCLA Indicates Either a Congressional Decision That Generator Liability be Prospective Only or No Congressional Decision

The bill that eventually became CERCLA had its genesis in three separate "Superfund" bills. In the House, two bills were passed and sent to the Senate on September 30, 1980: H.R. 85 dealt with the cleanup of oil spills from vessels; H.R. 7020 dealt

with the cleanup of abandoned waste sites. Earlier, in July of 1979, a broader, more comprehensive waste cleanup bill, S. 1480, had been introduced in the Senate. While different in many respects, the House abandoned waste site bill, H.R. 7020, and S. 1480 both contained similar liability provisions including common law type causation requirements as well as provisions for strict joint and several liability.[11] As introduced, the House bill contained a provision explicitly making the liability retroactive. This was deleted in committee. The bill coming out of committee still contained the common law causation in fact requirement. Although causation in fact might be viewed as still indicating potential retroactive liability, the burden on the plaintiff to prove common law type causation was a significant limitation on the potential liability. As stated in the House Report on H.R. 7020:

> [T]he mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup costs are incurred would not, in and of itself, result in liability....the plaintiff must demonstrate a causal or contributory nexus between the acts of the defendant and the conditions which necessitated response action...

H.R. Rep. No. 96-1016, Part I, 96th Cong., 2d Sess. (1980) reprinted in 2 Legislative History at 64. Under the example given, generators and transporters obtained some insulation from liability by requiring that a plaintiff prove a common law type causal or contributory nexus.

Both H.R. 7020 and S. 1480 also provided for the creation of a "fund" to be financed through fees imposed gener-

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[11] *See* H.R. 7020, 96th Cong., 2d Sess. § 3071 (1980) (as introduced), reprinted in 2 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) 38-41 (1983) (hereinafter 2 Legislative History); and S. 1480, 96th Cong., 1st Sess. § 4 (1979) (as introduced), reprinted in 1 Legislative History at 168-73.

ally on manufacturers of hazardous substances. The primary purpose of the fund was to finance government responses. 1 Legislative History at 59-130, 149. The primary purpose of the liability scheme, on the other hand, was deterrence. Id. at 68-69, 149. Imposing liability on those responsible for releases of hazardous substances would "serve[] as an incentive for the sound treatment and handling of hazardous substances in order to prevent accidents in the first place." *Id.* at 149 (statement of Senator Culver). As noted below, this Court has recognized that a reference to deterrence as the legislative purpose is inconsistent with retroactivity since, by definition, the conduct has already occurred.

Despite the limited scope of liability due to the plaintiff's burden to prove common law type causation, both of these bills were objected to on a number of grounds, including that the liability might be retroactively applied. In the Senate, several key Senators (including minority leader Howard Baker) opposed the potential liability for cleanup costs that would be created "in some cases" retroactively under S. 1480. *See* 1 Legislative History at 426 (statement of Sens. Baker, Bentsen and Domenici). There was also similar opposition in the House. *See* 2 Legislative History at 359. After the provision in the House bill that provided for retroactivity was stricken, the House passed H.R. 7020. 2 Legislative History 294-390. The House bill was referred to the Senate, where it made no further progress.

The Senate focused on its own bill, S. 1480. As reported out of committee, S. 1480 can best be described as a legislative "Christmas Tree". It contained provisions for recovery for such items as damages for economic loss due to personal injury, damage to real property, damage to natural resources, loss of use of natural resources, loss of income or profits, and medical expense reimbursement. These items were in addition to cleanup costs. Provisions were also included by which citizens could assign their claims to the United States, collect from the fund and then the government would have to pursue

the claims. The Senate bill contained the four classes of liability groupings that are currently in the statute (current owners, owners or operators at time of disposal, arrangers for disposal, and transporters). It also provided for strict joint and several liability. 1 Legislative History at 485-501. The Senate bill likewise made no progress.

On November 14, 1980, Senators Stafford and Randolph introduced a compromise bill. Compared with the original Senate bill, this first compromise bill omitted the claims for personal injury damages and for property damage, eliminated the common law causation requirement, deleted all reference to "joint and several liability", and also eliminated "the scope of liability." 1 Legislative History at 695. It retained the four categories of potentially liable persons for cleanup costs carried over from Senate bill as reported out in July *See* 3 Legislative History at 238. The compromise bill that Senators Randolph and Stafford crafted came up for consideration on November 20, 1980. However, it did not fare any better on the Senate floor than did the original bill. One of the main (and most influential) opponents, minority leader Baker, stated:

> I do not think, in all candor, that the Randolph-Stafford bill is a compromise in the sense that it would permit us to proceed at this time to the consideration of this measure. [¶] ... I express my regret that we apparently are at an impasse on this subject ...

1 Legislative History at 554.

With time running out on the 96th Congress, a bipartisan coalition of Senators emerged on November 24, 1980 from several days of closed-door sessions with a second, revised compromise bill known as the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980." 1 Legislative History at 560. It too retained the four categories of potentially liable persons for cleanup costs carried over from Senate bill as reported out in July, but, among other things, it added for the first time an overarching provision that

all liability would be governed by the standards of the Clean Water Act. 1 Legislative History at 577-78, 602-03.

Senator Stafford noted: "It became clear, soon after we introduced our original compromise amendment last week that there remained strong concern and opposition to even that measure." *Id.* at 695.

> I am a realist. I know that Members of the Senate find S. 1480 too ambitious. I believe they are mistaken. I believe 23 other Senators agree with me because they have cosponsored S. 1480. *But the fact remains that at this time and in this place S. 1480 cannot be enacted. But this final compromise can.*

Id. at 696 (emphasis added). The inclusion in the final compromise of the overarching provision setting the standard of liability as the standard in the Clean Water Act, which was not in the Senate bill as reported out in July or in the first Stafford - Randolph compromise bill, allowed each Senator to put a somewhat different "spin" on what had been agreed to.

Senator Randolph linked the Clean Water Act reference to the retention of strict liability:

> "Unless otherwise provided in this act, the standard of liability is intended to be the same as that provided in section 311 of the Federal Walter Pollution Control Act (33 U.S. 1321). *I understand this to be a standard of strict liability.*"

1 Legislative History at 686 (emphasis added).

Senator Helms linked the Clean Water Act reference to resolving the harshness of potential joint and several liability:

> The drafters of the Stafford-Randolph substitute have recognized this unfairness, and the lack of wisdom in eliminating any meaningful link between culpable conduct and financial responsibility. Consequently, all references to joint and several liability in the bill have been deleted. The bill now provides that the listed classes of defendants will be liable for government removal and remedial costs and associated damages of natural re-

> sources, in accordance with the standard of liability specified in section 311 of the Federal Water Pollution Control Act [Sec. 101 (32)]. *That section on its face does not impose joint and several liability, and the courts applying section 311 have not attempted to ignore the language of the statute.*

1 Legislative History at 759 (emphasis added). Senator Stafford, made clear that the Clean Water Act standard of liability was to govern in all cases and all new theories of liability had been deleted.

> Mr. SIMPSON. Mr. President, with the adoption of the compromise offered by Senator Stafford and Senator Randolph there are several vital areas which require further elaboration for the record. One issue in particular necessitates additional clarity - liability under section 107. The report of the Senate Committee on Environment and Public Works, Report no. 96-848, went into some detail on the nature of liability under S. 1480 did it not?
>
> Mr. STAFFORD. Mr. President, Senator Simpson is correct. As reported by the committee, S.1480 and its accompanying report set the standard of liability as one of joint, several, and strict liability. However, *in order to avoid confusion over new language the compromise bill simply defers to existing law in section 311 of the Clean Water Act which already provides a liability standard for recovery of costs for response and remedial actions in preventing and cleaning up releases or discharges of hazardous substances* [Sec. 101(32)].
>
> Mr. SIMPSON. Mr. President, I find that to be a major improvement since there are various common law and statutory doctrines of 'strict,' 'no fault,' or product liability.
>
> Mr. STAFFORD. *The standard of liability in this compromise is the same as the liability under section 311(f)(1) of the Federal Clean Water Act. By referring*

> *to this section we avoid any confusion that might result from new language. The liability standard under section 311 will apply, unchanged, to this bill.*

1 Legislative History at 769 (emphasis added).

The final Senate compromise was passed on November 24, 1980. It was sent to the House with a cautionary letter dated December 2, 1980, from Senators Stafford and Randolph, that the coalition that enabled the bill to pass had begun "to disintegrate to the point that, in our judgment, it would now be impossible to pass the bill again, even unchanged." 1 Legislative History 774-75. The bill, they acknowledged: "represents an extremely delicate balancing of interests". They concluded: "[I]t is not what we would have wanted under other circumstances, but was the best we could do at the time." *Id.* The House accepted and passed the Senate bill without change as HR 2720, and the Senate inserted its comprehensive amendment into HR 7020 on December 3, 1980. 1 Legislative History at 776-824.

As noted above, the standard of liability under the Clean Water Act is prospective. Since the Clean Water Act had been in effect for eight years, Congress is presumed to have known that. On an individual basis, it is impossible to know what each Senator had in mind when he or she voted for a bill that "represents an extremely delicate balancing of interests". But they all certainly knew that the liability issues had been swept under the proverbial rug. Interestingly, not a single supporter of the final Senate compromise bill indicated that retroactive liability was intended by the compromise or which provisions in the final CERCLA compromise bill, if any, were intended to create retroactive liability.

The government relied below on the "Additional Views" of those Senators who five months before were concerned about the scope of liability in the earlier (Christmas Tree) version of the Senate bill. That was the bill that Senator Stafford later admitted "cannot be enacted". Acknowledging that

a mechanism was needed to clean up the old hazardous waste sites, Senators Domenici, Bentsen and Baker added "[h]owever, we do take issue with the approach that S. 1480 [as reported out in July] takes in substantially changing existing common law (in *some* cases retroactively)...." 1 Leg. Hist. 426. (emphasis added). "Some" cases, however, is not "all" cases.[12]

The fact that Congress intended CERCLA liability to serve as a deterrent to those who manufactured and transported substances also tends to negate any intention to create retroactive liability as to those classes of persons. There is no deterrent effect in the retroactive imposition of liability since the conduct to which it applies has been long ago completed. This Court has repeatedly indicated it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence ..." *Landgraf* 511 U.S. at 281 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)). The *Usery* decision, preceded CERCLA by four years and was also presumably known to at least some members of Congress.

Congress Did Not Embrace Any Judicial Opinion Interpreting CERCLA to be Retroactive

The government is likely to cite to pre-*Landgraf* cases holding CERCLA retroactive, and then argue that Congress has

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[12] If anything, this tends to confirm that potential retroactivity in "some" cases was one of the issues that came out of the Senate Report that was resolved in the final compromise by incorporation of the Clean Water Act liability standard. Moreover if Congress had intended section 107(a) to be retroactive in all four categories, the compromise would have created broader liability than the original bills because the need for a plaintiff to prove common law type causation had been deleted. Broader liability was clearly not intended. Moreover, the final Senate superfund bill that went on to be enacted as CERCLA was *cosponsored* by minority leader Baker and was supported by Domenici and Bentsen. CERCLA was passed, therefore, with the *support*, not the opposition, of those senators who had most strongly opposed even the limited potential retroactive liability in the original Senate bill. If there is any inference to be drawn, it is that their concerns had been addressed.

reauthorized CERCLA twice (in 1986 and again in 1990). It is well settled that when Congress reenacts a statute in the face of clearly developed case law, the reenactment includes the settled judicial interpretation of the statute. In 1990, however, Congress did not reexamine or revise any of CERCLA. All that Congress did that year was to reauthorize the taxing authority to finance the superfund.

When CERCLA was reauthorized in 1986, it had been less than six years since it had been originally enacted. No circuit court had ruled on the issue of retroactivity,[13] and among the district courts there was no uniformity of interpretation. *Compare Georgeoff*, 562 F.Supp. at 1314 and *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D.Colo. 1985). (holding CERCLA to be retroactive) *with United States v. South Carolina Recycling and Disposal, Inc.*, 653 F.Supp. 984, 996 (D.S.C. 1986) (holding application of CERCLA to past conduct not to constitute retroactivity in the constitutional sense).

By contrast, this Court's cases on the use of that proposition show a very different fact pattern. In both *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983), and *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), there were over 30 and 20 years, respectively, of developed case law (including numerous appellate decisions) interpreting the respective statutes. In *Pierce v. Underwood*, 487 U.S. 552, 567 (1988), all of the Circuits had interpreted the statute at issue, and all but one Circuit had interpreted it the same way.

Cases Since Landgraf

Since *Landgraf*, there has been one appellate court decision and several district court decisions, all supporting the government's interpretation albeit on somewhat different theories.

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[13] The first appellate court decision supporting the government's position was *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986)(*NEPACCO*). *NEPACCO* was decided several months after CERCLA was amended in 1986.

Many of the cases are distinguishable or demonstrably incorrect. The *Olin* decision in the Eleventh Circuit, *supra,* dealt with a current owner that was also the owner or operator at the time of disposal, under CERCLA §107(a)(1)(2). It did not deal with generator liability under CERCLA §107(a)(3). The Eleventh Circuit acknowledged that CERCLA contains "no explicit statement regarding retroactive application of its cleanup liability provisions." 1997 U.S. App. LEXIS 5488, *20. *Landgraf* states that if "the statute contains no such express command, the court must determine whether the new statute would have retroactive effect". 511 U.S. at 279. Thus, the Eleventh Circuit's first responsibility was to determine whether it faced a retroactivity issue at all. Since in *Olin* the defendant was the current owner when the action was brought and had been for many years after CERCLA was adopted (the claim having been brought in part under CERCLA § 107(a)(1)), no retroactive application of CERCLA liability was involved. That should have been the end of the analysis. The Court, however, also went on to note the temporal provisions in CERCLA §107(a)(2)(i.e., owner or operator "at the time of disposal").

> Congress thus targeted both current and former owners and operators of contaminated sites. By imposing liability upon former owners and operators, Congress manifested a clear intent to reach conduct preceding CERCLA's enactment.

1997 U.S. App. LEXIS 5488, *20. As applied to site owners and operators, the Eleventh Circuit may be right. Nothing, however, suggests that persons that lawfully arranged for disposal prior to CERCLA's adoption are covered retroactively. The Eleventh Circuit then relies upon the government's Section 103 (c) argument to further support its interpretation of legislative intent. 1997 U.S. App. LEXIS 5488 *21. As noted above, however, CERCLA §103(c) does not apply at all to persons that arranged for disposal. The Eleventh Circuit then asserts that only by creating retroactive liability can CERCLA's purposes of cleaning up pollution and "assigning responsibility to culpable

parties" be achieved. 1997 U.S. App. LEXIS 5488 *23-24. The whole point, however, is that persons who lawfully arranged for disposal are not culpable parties and the legislative history does not show a clear intent to assign liability to them retroactively. In the instant case (Butler Tunnel) the culpable party was the recycler who unlawfully disposed of waste in a borehole instead of recycling it as he was licensed and paid to do. The recycler went to jail. There is no evidence anywhere in the record that Alcan (or any of the other Respondents that dealt with the recycler) had any knowledge of the recycler's activities. That is why the imposition of retroactive liability on those who lawfully "arranged for disposal" is so unfair, and should not be lightly inferred.

The *Olin* court seeks additional support for its conclusion from the fact that the four categories of liability in the final Senate compromise bill that passed were carried forward essentially unchanged from what we have characterized as the Christmas Tree bill reported out of committee in July of 1980. 1997 U.S. App. LEXIS 5488, *25. While it's true that the four categories of liability were carried forward, the relevant fact that the Eleventh Circuit missed is that the bill could not pass, and didn't, until the Clean Water Act standard of liability was engrafted onto it as part of the final compromise. The four categories didn't change, but the standard of liability did. Finally, the Eleventh Circuit incorrectly states that the passage of the bill didn't turn on retroactivity but on redaction of the prior bill's provisions for joint and several liability and for liability for personal injury. 1997 U.S. App. LEXIS 5488, *26. If that were true, the first Randolph - Stafford compromise bill would have passed, since those items were all redacted. *See* 3 Legislative History 238-239.

The Eleventh Circuit's errors in attempting to devine legislative intent emphasizes the need to adhere to the wisdom that underlies *Landgraf*. If the decision to impose retroactive liability is not either (a) expressly provided for in the law itself as passed by Congress and signed by the President, or (b)

otherwise clear (e.g., from an unambiguous statement in a Senate - House Conference Report that the Senators and Congressmen clearly knew about when they voted for the bill), the liability created is prospective - period. Imposition of retroactive liability is a legislative, not a judicial task.

Some examples of the district court decisions since *Landgraf* point up the problem of courts searching for legislative intent from snippets of history or finding clear intent to create retroactive liability from a generalized purpose to remedy the problem of abandoned waste sites. In *Cooper Industries, Inc. v. Agway, Inc.*, 1996 U.S. Dist. LEXIS 14196 (N.D.N.Y., Sept. 23, 1996), the court reviewed in detail the House Report. 1996 U.S. Dist. LEXIS 14196 * 25-26. "Based on the foregoing, the Court finds that Congress intended CERCLA to be applied retroactively." *Id.* at *26. The court was apparently unaware that it was the Senate bill, not the House bill, that passed. In *State of Nevada ex rel. Dep't of Transp. v. United States, supra,* the court found the legislative intent to provide for retroactive application of the CERCLA's liability provisions from the general legislative purpose to address abandoned sites and cleanup the environment from past disposal practices. 925 F.Supp. at 695, n. 8. This is basically the same pattern as from the pre-*Landgraf* cases.

The leading pre-*Landgraf* cases were *Georgeoff, NEPACCO* and *Shell Oil.* The Courts in all three cases gave lip service to the then admittedly ambiguous presumption against retroactivity. Each case begins its analysis by finding no clear statement or intent in CERCLA's liability provision that Congress intended CERCLA liability to apply retroactively. Having done so, the courts then proceeded to draw every possible inference in favor of the retroactive application of CERCLA, essentially reversing the presumption against retroactivity into one *in favor* of retroactivity.

In *Georgeoff*, the court (after rejecting the "past tense" argument) nevertheless found a clear Congressional intent in favor of retroactivity from the fact that the $1.6 billion "Superfund"

funded by tax revenues standing alone would be insufficient to clean up all the estimated sites. *Georgeoff, supra*, at 562 F.Supp. at 1312-1313. That apparent insufficiency may have be true but the correct answer was for Congress to fix the problem, not for the Court to do Congress' job for it. (Interestingly, the $1.6 billion the Court found too little was later increased by Congress to $8.5 billion, as noted above). In *NEPACCO*, the court found it "manifestly clear that Congress intended CERCLA to have retroactive effect" based largely on the "past tense" argument discussed above. 810 F.2d at 732-33. "Further," the court continued, "the statutory scheme itself is overwhelmingly remedial and retroactive." 810 F.2d at 733. Finally, in *Shell Oil*, the court had concluded that CERCLA was retroactive based on the "general purpose and scheme of CERCLA" before it even got to an analysis of CERCLA's specific statutory provisions. 605 F.Supp. at 1069, 1073. In light of this Court's holding in *Landgraf*, these pre-*Landgraf* decisions cannot be relied upon as precedent.

CONCLUSION

Remanding the instant case to the Third Circuit with instructions to reconsider in light of this Court's decision in *Landgraf*, which intervened between *Alcan I* and *Alcan II*, would send a strong and needed signal to the lower courts to take seriously this Court's admonition in *Landgraf* that legislation creating new liability is always deemed to be prospective unless the people's elected representatives (not judges) make a clear decision to impose the liability retroactively.

Respectfully submitted,

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Incorrect Statements in Alcan's Petition for Certiorari

Alcan states that the EPA response in 1985 to the oily slick on the Susquehanna River was driven by hazardous substances which were identified as "Consent Order Constituents" (Petition, p. 4. n. 1). It also states that the Government recovered a disproportionately small percentage of EPA's response costs from other defendants. Consent Order Constituents". (Petition, p. 4).

With respect to the first statement, the Consent Order was entered in 1987 and designated constituents to be studied thereafter. With respect to the 1985 cleanup itself, Alcan's witnesses acknowledged that there were hazardous constituents in the oily slick but testified the response costs were the really the result of oil (J.A. 95, 100, 102). The government's witness also acknowledged the hazardous constituents in the oily slick (J.A. 129, 133) but testified that there were no cleanup activities in 1985 for material that was not oil or dissolved in oil. J.A. 129-132. When asked what actually drove the response costs, EPA's witness testified: "Oil. The 1985 response was initiated because there was oil on the river." J.A. 157. With respect to the second statement, Alcan was one of the recycler's best customers J.A. 211. The government's best estimate is that 121,000 to 300,000 gallons of Alcan's waste oil was disposed at the Borehole. J.A. 197. This is more than the 32,500 to 37,500 gallons taken into account below and the bulk of Alcan's 2.3 million gallons sent to the recycler (J.A. 252) are not accounted for in the record. The used Farbest B207 and B216 in Alcan's waste (J.A. 231-32) caused its waste to be "self-emulsifying". J.A. 89-90. It preferentially dissolved constituents in the Tunnel (J.A. 113-14), had a scouring effect that tended to mobilize tunnel waste, increased the discharge, and moved the contamination further down the river J.A. 119-20, 140-42. It also made EPA's booms less effective in preventing the spread of the oily slick down the river. J.A. 119, 140-42.